STATE OF MAINE
DIRIGO HEALTH AGENCY

IN RE:

DETERMINATION OF AGGREGATE MEASURABLE COST SAVINGS FOR THE SECOND ASSESSMENT YEAR (2007)	))))	DIRIGO HEALTH AGENCY'S PREHEARING BRIEF

INTRODUCTION

The Health Reform Act established Dirigo Health as an independent executive agency to arrange for the provision of comprehensive, affordable health care coverage to small employers and individuals. 24-A M.R.S.A. § 6902. The Health Reform Act also established a Board of Directors that oversees the work of Dirigo Health. 24-A M.R.S.A. § 6904. An essential component of the Health Reform Act is the provision of subsidies for the purchase of Dirigo Health insurance coverage by low income individuals and employees. 24-A M.R.S.A. § 6912. These subsidies are funded by savings offset payments made by health insurance carriers, employee excess benefit insurance carriers and 3rd party administrators. 24-A M.R.S.A. § 6913(2). In turn, health insurance carriers are to take steps to recover savings offset payments through negotiation of reimbursement rates with health care providers. 24-A M.R.S.A. § 6913(7).

The amount of savings offset payments is not unlimited. The Legislature, for health insurance carriers, has set a maximum payment of 4.0% of annual paid claims for health care on policies issued in Maine for Maine residents. For 3rd party administrators the maximum payment is 4% of annual paid claims for health care for residents of Maine.

The maximum payment for employee benefit excess insurance carriers is 4% of annual paid claims on employee benefit excess insurance policies issued in Maine for Maine residents. 24-A M.R.S.A. § 6913 (3) (B). In addition, the savings offset amount is to reflect and not exceed aggregate measurable cost savings. 24-A M.R.S.A. § 6913 (2) (C).

The first step in establishing the savings offset amount is the determination of aggregate measurable cost savings pursuant to 24-A M.R.S.A. § 6913. This determination is made by the Board and reviewed by the Superintendent. 24-A M.R.S.A. § 6913. The Board is to determine the "aggregate measurable cost savings, including any reduction or avoidance of bad debt and charity care costs to health care providers in this State as a result of the operation of Dirigo Health and any increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004." 24-A M.R.S.A. § 6913(1) (A).

A major goal of the Act was to control the rate of growth of costs for health care and health coverage in Maine, a goal to which the Legislature asked health care practitioners, hospitals and health insurance carriers to contribute. Health care practitioners were asked to limit for a one year period (July 1, 2003 to June 30, 2004) the growth of net revenue of the practitioner's practice to 3%; hospitals were asked to hold for that period consolidated operating margins to no more than 3% and to restrain cost increases to no more than 3.5% as measured by expenses per case mix adjusted discharge ("CMAD")[1], and health insurance carriers were asked to limit for that period the pricing

[1] Chapter 469 Part F outlines the voluntary targets established to control growth of insurance and health care costs. The member hospitals of the Maine Hospital Association agreed to voluntarily adhere to continued cost targets for the period June 2004 through June 2005. *See* Press Release, Maine Hospital Association, Hospitals Volunteer to Cap Costs for Another Year (June 16, 2004); Maine Hospitals Financial Information: http://www.themha.org/pubs/Financialinformation.pdf.

of products sold in Maine to a level that supported no more than a 3% underwriting gain less federal taxes. P.L. 2003, ch. 469, § F-1.

ARGUMENT

I. Aggregate Measurable Cost Savings Includes More Than Just Reduction or Avoidance of Bad Debt and Charity Care Costs

The DHA has included in its methodology and calculation of AMCS several initiatives in addition to reduction of bad debt and charity care costs and increased enrollment in MaineCare. The other initiatives are either savings identified in the Health Reform Act[2] or flow from initiatives included in the Act.[3] The interveners have previously argued that only savings from a reduction of bad debt and charity care and increased enrollment in MaineCare should be included in AMCS. They base their argument on 24-A M.R.S.A. § 6913(1)(A):

> After an opportunity for a hearing conducted pursuant to Title 5, chapter 375, subchapter 4, the board shall determine annually not later than April 1st the aggregate measurable cost savings, including any reduction or avoidance of bad debt and charity care costs to health care providers in this State as a result of the operation of Dirigo Health and any increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004.

A. The Plain Meaning and the Placement of Punctuation in the Statute Establishes that ACMS Includes More Than Reduction of Bad Debt and Charity Care Costs

Based on the plain meaning of the statute, aggregate measurable costs are not only those savings that result from the "operation of Dirigo Health." A careful examination of

---

In addition, the Legislature extended the voluntary restraints effective July 1, 2005. P.L. 2005, ch. 394, § 4.

[2] Components identified in the Act are CMAD, hospital expenses per case mix adjusted discharge; COM, hospital consolidated operating margins; health insurance carrier underwriting gains; and growth in health care practitioner net revenue. P.L. 2003, ch. 469 § F(1)(A)-(C).

[3] Components that flow from the Act are time value of accelerated supplement payments to hospitals; accelerated prospective interim payments (PIP); increased physician payments; and moratorium on Certificate of Need and limits in spending set Capital Investment Funds.

the structure of Section 6913 (1)(A) and the punctuation used shows that the Legislature coupled the words "as a result of the operation of Dirigo Health" with the words "any reduction or avoidance of bad debt and charity care to health care providers in this State" to form one complete clause. If the Legislature had intended the meaning of Section 6913 (1) (A) urged by the interveners, it would have placed a comma before and after the words "as a result of the operation of Dirigo Health."

Although DHA believes the intent of the Legislature is clear, and there is no need to look beyond the words of the statute, it is appropriate, when the meaning of a statute is not clear, to look at punctuation to discern legislative intent. See *Hayes v. State of Maine*, 247 A2d 101,103 (Me. 1968), citing *Taylor v. Inhabitants of Town of Caribou*, 102 Me. 401, 67 A. 2 (1907). The punctuation in this case makes it unmistakably clear that the phrase "as a result of the operation of Dirigo Health" only modifies the savings from "any reduction in accordance of bad debt and charity care costs." It does not modify or in any way relate to savings from other savings initiatives that are identified or flow from the Health Reform Act.

In addition, the word "including" is not a limitation on the components of AMCS. *See, S.D. Warren Company v. Board of Environmental Protection,* 2005 ME 27, ¶ 15, 868 A.2d 210, 216 (court looks first to plain meaning of statutory language to effect legislative intent), citing *Butterfield v. Norfolk & Dedham Mut. Fire Ins. Co.*, 2004 ME 124, ¶ 4, 860 A.2d 861, 862. With regard to the word "including", the Law Court has made it clear that the plain meaning of "*includes* does not suggest it is a word of limitation." *S.D. Warren*, 2005 ME 27, ¶ 16, 868 A.2d at 216-217.

B. The Overall Scheme of the Health Care Reform Act Demonstrates the Legislature's Intent

The overall scheme of the Health Reform Act further demonstrates that the Legislature intended AMCS to include more than a reduction of bad debt and charity care costs. See, *Botting v. Department of Behavioral and Developmental Services*, 2003 ME 152, ¶ 10, 838 A.2d at 1171 (court considers entire statutory scheme to give effect to legislative intent). The purpose of the Health Reform Act is stated in the title: "An Act to Provide Affordable Health Insurance to Small Businesses and Individuals and to Control Health Care Costs." P.L. 2003, ch. 469. Dirigo Health provides affordable health insurance through the DirigoChoice Health Insurance Plan administered by Anthem Health Plans of Maine d/b/a Anthem Blue Cross and Blue Shield ("Anthem"). 24-A M.R.S.A. § 6910. Under Chapter 469, the rate of growth of costs of health care and coverage, in part, are to be controlled through:

- limitations in hospital capital expenditures, ch. 469, § B-1, 2 M.R.S.A. § 102;
- a moratorium on certificate of need approval, Rules of Department of Human Services, Bureau of Medical Services, ch. 501;
- limits on growth of net revenue of physicians, ch. 469, § F-1(1)(A);
- limits on hospital cost increases (CMAD), ch. 469, § F-1(1)(B);
- limits on hospital consolidated operating margins (COM), ch. 469, § F-1(1)(B); and
- limits on insurance carrier underwriting gains, ch. 469, § F-1(1)(C).

In addition, the legislation established the Commission to study Maine's Community Hospitals (the "Hospital Commission"). P.L. 2005, ch. 469, § F-3(1). One purpose of the Hospital Commission was to "study funding mechanisms and levels, methods of reimbursement, the role of insurance and 3rd party payors and the effect of

unreimbursed care". ch. 469, § F-1(1)(C). The report of the Commission, required by Chapter 469, § F-1(5), recommended that the State increase Medicaid payments to physicians and hospitals, revise periodic interim payments ("PIP") estimates to realistically recognize increases in Medicaid utilizations and pay past obligations to hospitals. (Year One Record Binder 2 at 422).

C. The Agency's Interpretation of the Statute is Entitled to Deference

It is appropriate to give deference to the agency in administering the savings offset provisions of Chapter 469 and its interpretation of what initiatives should be included in AMCS. *Botting*, 2003 ME 152, ¶ 9, 838 A.2d at 1171 (court defers to agency's interpretation of statute it administers when interpretation as reasonable and within the agency's expertise). The agency's inclusion of the categories contained in Mercer's Final Report is a reasonable interpretation that best serves the goals of the Dirigo Health Program and the people of the State of Maine.

II. THE COST SAVINGS ESTABLISHED BY THE AGENCY WILL BE SUPPORTED BY COMPETENT EVIDENCE

Any consideration of the reasonableness of the amount of ACMS determined by DHA must take into account the unique approach taken by the State of Maine in addressing the issue of the rapid rate of growth of costs for health care and health coverage in the state. This approach, incorporated into the Dirigo Health Act, is characterized by cooperation and a sharing of the burden of the growth in health care costs. Thus, health care practitioners, hospitals and health insurance carriers are all to contribute to generating savings in the health care system. The Legislature, however, has not mandated that the stakeholders take action to limit growth and generate savings but has only asked that the stakeholders voluntarily participate. Certain savings determined

by DHA have been realized as a result of such voluntary participation. It was the expectation of the Legislature that these savings would be passed on to consumers through the operation of the market.

The case that will ultimately be presented by DHA and its consultants will demonstrate that its determination of AMCS is reasonable. The determination will be made using the methodology developed by the Mercer Government Human Services Consulting group. This methodology is based on standards that include: actuarial science best practice; reasonableness of the assumptions used; reasonableness of the calculations; credible and readily replicable calculations; and readily validated terms and data. In addition, to the extent possible, the methodology is consistent with the guidelines provided by the Superintendent of Insurance in his decision regarding year one AMCS. *See* Report to the Dirigo Health Agency: Dirigo Health Savings Offset Payment: Year 2—Methodology and Data Sources (to be supplemented and finalized when complete data is available). The data that will be used by Mercer in its calculations will be readily available, accepted by the health industry and relied upon by the health industry. No credible argument can be made that this methodology is unreasonable, arbitrary or capricious.

CONCLUSION

For the reasons stated above, the Board should determine that the methodology used by DHA is reasonable and include in its determination of AMCS initiatives other than bad debt and charity care, as will be presented at hearing by DHA and its consultants. As the agency charged with the responsibility of administering the Health

Reform Act, DHA is entitled to deference in its interpretation of what initiatives should be included in the AMCS.

Dated: March 24, 2006

/s/ Kelly L. Turner

Kelly L. Turner Bar No. 9393
Assistant Attorney General
Office of Attorney General
6 State House Station
Augusta, ME 04333-0006
(207) 626-8800